Supreme Court, U. S.
FILED
NOV 30 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court
of the United States

OCTOBER TERM, 1974

No. 74-683

REUBEN G. LENSKE,

Petitioner,

v.

STATE OF OREGON (ex rel Oregon State Bar),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

REUBEN G. LENSKE
1014 S. W. 2nd Avenue
Portland, Oregon 97204
Petitioner

STEVENS-NESS LAW PUBLISHING CO., PORTLAND, OR. 97204 11-74

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REUBEN G. LENSKE,

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STATE OF OREGON (ex rel Oregon State Bar),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Petitioner prays that a writ of certiorari issue to review the opinion and order of suspension of the Supreme Court of Oregon of June 27, 1974 and the order denying petition for rehearing entered on September 4, 1974.

OPINION BELOW

The opinion of the Supreme Court of Oregon was rendered on June 27, 1974 as Case No. 10,381 of Advance Sheets of the Supreme Court of Oregon, Ap-

pendix 1-22, 99 Adv. Sh. 580. The order denying petition for rehearing was rendered without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The opinion and order of suspension were rendered on June 27, 1974. On July 11, 1974 a motion was filed for extension of time to August 6, 1974 to file a petition for rehear ng and an order allowing the motion was entered on July 16, 1974 and a petition for rehearing was filed on August 6, 1974. The petition was denied on September 4, 1974 wtihout written opinion.

QUESTIONS PRESENTED

1. Have the complaint and the proceedings against petitioner violated the Fourteenth Amendment to the U. S. Constitution in:

a. Depriving petitioner of the right to earn a livelihood through his chosen profession without due process of law and in

b. Denying petitioner the equal protection of the laws.

STATUTES INVOLVED

None.

FORMER OPINION INVOLVED

In The Supreme Court of the State of Oregon
In re Complaint as to the Conduct of
Reuben G. Lenske, Accused.
Per curiam.
June 27, 1974, 99 Advance Sheets 580.

STATEMENT OF THE CASE

Petitioner was admitted to and practiced law in the State of Oregon from 1925 until 1964 when he was summarily suspended without notice or hearing following a conviction in the U. S. District Court for the District of Oregon for alleged filing of false income tax returns. Upon appeal to the Ninth Circuit the conviction was set aside by first opinion in October, 1966 and final opinion in August, 1967, *Lenske* v. *U. S.*, 383 F.2d 20 (1967).

In June, 1964, shortly after the conviction, John Holloway, secretary of the Oregon State Bar, filed a disciplinary proceeding against petitioner (Case No. 762), solely on the ground of the income tax case conviction (App. 25). Petitioner duly answered, alleging illegality o fthe judgment of conviction and stating that he had appealed to the Circuit Court of Appeals (App. 25). Holloway thereupon failed to either dismiss the case or set it down for trial but maintained it on the roster for five years (App. 25, 27, 28). In June, 1969, almost three years after the first opinion of the Ninth Circuit in favor of petitioner, Holloway filed an amended complaint in said Case No. 762. He

completely ignored the tax conviction allegations of the original complaint and did set forth four unrelated and independent alleged causes against petitioner (App. 24, 25, 26, 28). After trial on the four charges in Case No. 762 the Supreme Court of Oregon exonerated petitioner, 259 Or. 228, 485 P.2d 419 (1971).

Not long after that, in September 1972 Holloway filed the current complaint, Case No. 1063 (App. 2). Holloway testiifed in both Case No. 762 and the instant case, No. 1063, that usual disciplinary procedure is as follows. When a complaint is made against an attorney the secretary of the bar writes the attorney and gives him an opportunity to answer or make explanation of the subject of the complaint. This is done in ninety per cent of all complaints, the exception being in solicitation cases (App. 23-28). The Bar may then dismiss the matter; but if it files a formal complaint against a lawyer it no longer may dismiss but the determination in the matter must be made by the Supreme Court of Oregon.

In filing the original complaint in April, 1964, in Case No. 762 no prior notice of any kind was given to petitioner. No opportunity was given him to show, before the formal complaint was filed against petitioner, that the tax evasion judgment against him was void on its face and that he had filed both a motion for new trial and also an appeal to the Circuit Court of Appeals (App. 24). Likewise, the four causes alleged against petitioner in the amended complaint were made without having written petitioner for

an explanation before filing the amended complaint (App. 24). Likewise and most importantly, Holloway filed the current complaint against petitioner in Case No. 1063 without having given him an opportunity to make explanation of any inconsistency that might appear (App. 28). That makes a total of five charges in Case No. 762 and one (ignoring the alternative feature) in Case No. 1063, making six cases in which Holloway failed to follow the usual course of writing the attorney and giving him an opportunity to explain the apparent discrepancy. None of the cases involved solicitation of law business and each was susceptible of the raising of either legal or factual explanations. See petitioner's briefs and petition for rehearing.

The discriminatory treatment accorded petitioner by Holloway and the busy Board of Governors can be illustrated by a few of many possible illustrations. A flagrant one is the contrasting treatment given Lee Johnson, who was a member of a wealthy family of high society, a member of a large law firm, and who was elected attorney general of the State of Oregon in 1968 (App. 38). A three judge Circuit Court panel had unanimously held that Lee Johnson violated the Corrupt Practices Act in winning the election and a District Court had convicted him in the matter of his affidavit under that act (App. 35-38) and *Robert Y. Thornton* v. *Lee Johnson*, 253 Or. 342, — P.2d — (1969). *State of Oregon* v. *Lee Johnson*, 1 Oregon Court of Appeals 363 (1969) and the briefs and pleadings in those cases (App. 35-38).

Holloway testified (App. 26; Vol. 1, p. 132, l. 18):

> Q. All right. Now, and is it the usual procedure when a person has been convicted of a crime, when a lawyer has been convicted of a crime, to automatically ask for his suspension?
>
> A. Yes.

Ironically, Holloway must have been thinking of petitioner when he made that answer. My questioning him further about the Lee Johnson case disclosed that no suspension was requested, no complaint was filed, no letter of inquiry sent to Lee Johnson. This in the face of a three judge decision of corruption in attaining the office of the highest legal officer of the State of Oregon and in the face of a criminal conviction by a District Court pertaining to the affidavit required under the Corrupt Practices Act (Vol. I, pp. 133, 134, App. 26, 27).

It could fairly be presumed that judicial notice could be taken that news media in Oregon would apprise the secretary and the Board of Governors of such court judgments. Holloway did not testify about the media bringing the Lee Johnson cases to the attention of the Board and its secretary. But they did learn about it. How? As Holloway put it: Vol. I, p. 134 and App. 26, 27:

> Q. (line 6) Well, did that emanate from the Board in the first instance or was there any action of any kind, inquiry, study, concern on the part of the Secretary of the Board and of the disciplinary department?
>
> A. It emanated from the Board on a report to

> the Board including a letter of complaint from Charles O. Porter with all the material attached and the Board took action on that complaint which it does.

The foregoing testimony followed the previous testimony, page 133, line 25:

> Q. And no suspension after his conviction, no suspension recommendation made?
>
> A. (page 134, line 2) No. I can tell you that it was the conclusion and decision of the Board of Governors that Mr. Johnson has not been guilty of any professional misconduct warranting disciplinary proceeding. . . .

I call to the attention of the United States Supreme Court that amongst its records there is a petition for writ of certiorari by the same Charles O. Porter, former Congressman from Oregon, from a Board of Governors and Oregon Supreme Court reprimand in connection with one of the cases he had handled. And so public minded Charles O. Porter, the accuser of high office holder, sees the Board of Governors whitewash Lee Johnson but, not to the credit of the Oregon Supreme Court and the Oregon Court of Appeals, he was exonerated of all charges by those courts. But so was I exonerated by the Circuit Court of Appeals.

W. K. Royal, an attorney, testified falsely in my tax case regarding my claim to ownership of a specific piece of property. This was in February, 1963. In July, 1963 in litigation over the same property in

the Circuit Court W. K. Royal testified the opposite. I wrote to the Oregon State Bar and sent it excerpts from the respective transcripts and also advised it that W. K. Royal negotiated directly with my client and that was when I was attorney of record. See App. 39. Also complete documents in court file. The Board of Governors and, apparently the Supreme Court of Oregon, ignored this evidence. No investigation, no action was taken by Holloway.

An illustration of Bar action and non-action occurred at the hearing. One of my character witnesses, George Joseph, a former deputy district attorney, was asked regarding certain hearings and appearances. His testimony was inconsistent in some aspects. The chairman of the trial committee stated to Mr. Joseph:

> THE CHAIRMAN: (p. 167, line 5) So you were there and Mr. Lenske was there, both men?
>
> THE WITNESS: That appears to be correct, yes.
>
> THE CHAIRMAN: This would be inconsistent with your previous testimony. Do you want to correct that now? (App. 29).

Apportionment

The malapportionment of representatives to the Board of Governors results in the denial of the right of one man (woman) to one vote on the only semblance of self government under the integrated Bar. This is the denial of the equal protection of the law. See App. 40, a portion of Exhibit 14, the 1972 report

of the Committee on Function and Organization of the Oregon State Bar. The ratio of Governors to Lawyers ranges from 1 to 114 in the highest ratio district to 1 to 626 in the lowest ratio district.

DENIAL OF DUE PROCESS

The minutes of the Board of Governors of September 7, 1973, a copy of which constitutes pages 22 to 25 of petitioner's original brief described the offense for which petitioner was tried on the very first page as follows: (App. 40)

Charges — Perjury

None of the Constitutional safeguards was afforded petitioner for a trial on the charge of perjury.

60 Am Jur, Perjury, § 62, p. 1003.

McWhorter v. United States, 193 F.2d 982 (1952) 5 Cir.

In re Ruffalo, 390 U.S. 544, 550, 551 (1968), 20 L. Ed. 2d 117, 88 S. Ct. 353.

Siegel v. *Committee of Bar Examiners, State* Bar of Calif., 110 Cal. Rptr. 15, 28 (Oct. 9, 1973).

Bronston v. *U. S.*, 409 U.S. 352, 355, 357, 359, 93 S.- Ct. 595, 35 L. Ed. 2d 568 (Jan. 10, 1973).

The charging paragraph (III) of the complaint against petitioner appears on page 2 of the Appendix. Following are the inherent defects of that allegation:

1. It fails to allege a date for either of the alleged acts.

2. It fails to describe the real property. It wasn't until about the end of the second day of the hearing that it occurred to counsel for the prosecution that the description of the property was significant and colloquy occurred between the Committee and prosecution counsel to try to find out amongst themselves what property was intended in the complaint (See App. 32 and Vol. II, pp. 271-3).

3. It fails to allege that the testimony in either case was material. (The Oregon Supreme Court, in support of its conclusion that the testimony does not have to be material, cites cases and statutes which require materiality.)

4. It fails to allege the specific statements attributed to petitioner.

5. The accusatory allegation of perjury was in the alternative, alleging that one or the other conclusion was untrue, thereby requiring petitioner to bear the burden of coming to trial and defending himself on alternative charges.

The essence of due process under the Fourteenth Amendment is a fair trial. No unprejudiced judge or court will conclude that when a person's life-work is at stake a complaint devoid and as ambivalent as this complaint can pass the test of constitutional due process.

The conduct of the trial was also devoid of due process. See Volumes I and II and petitioner's briefs. The effect of the Oregon Supreme Court's opinion is

that it and it alone makes the decision and, therefore, it doesn't matter what kind of kangaroo proceedings bring the record up for the de novo trial. That at the very start the trial committee ignores the serious statements in the *in re Ruffalo* case makes no difference. Holloway, the secretary of the Bar, in one breath says the trial committee has sole jurisdiction and in another breath he rules on the accused's motions and challenges. That the same Holloway writes deprecatory letters to the accused, with copies to the trial committee and to the members of the Board of Governors, makes no difference. That a peremptory challenge and a challenge for cause are available to the accused is fine, but that no method is provided for the accused to get some idea from the Holloway appointees to the trial committee as to their beginning attitude towards the accused, doesn't matter. That the accused, petitioner, refused to testify on his own behalf in answer to a vague, indefinite and duplicitous charge against him is recognized as his right by the committee. But then, on cross-examination, for the prosecutors and the committee members to go hammer and tongue at the accused, cross-examining him about the very subject he refused to testify on in his own direct testimony, is ignored by the Supreme Court. That the secretary, the committee and the Board denied or ignored the timely single peremptory challenge of the chairman of the committee, makes no difference. The only answer to that by the Supreme Court is the untrue statement that accused had already exercised his one peremptory challenge. All these

substantive procedural rights expressed in so many U. S. Supreme Court opinions are swept aside. See petitioner's brief and the two volumes of testimony. And yet the Supreme Court of Oregon boasts of its previous persecutions of petitioner and ignored before and now ignores again the basic fair practices procedure guaranteed by the Fourteenth Amendment.

THE REAL REASON FOR PROSECUTING PETITIONER

Just a small bit of the good and courageous character of former congressman Charles O. Porter has rubbed off on petitioner. With a little courage and with a bit of ability, petitioner has attacked through the law a few sacred injustices, almost always without compensation. He fought the once touted House Committee on Un-American activities when it prosecuted and convicted a client who exercised his rights under the Fifth Amendment.

> *Simpson* v. *U. S.*, 355 U.S. 7, 78 S. Ct. 14, 2 L. Ed. 2d 22 (1957), 241 F.2d 222 (1957).

He fought for freedom of public information that was denied a college professor who sought to know the fallout effect of nuclear testing.

> *MacEwan* v. *Holm et al (State Board of Health)*, 226 Or. 27, 359 P.2d 413 (1961).

He sued Internal Revenue employees for wrongful destruction of a woman's assets while seeking to enforce the payment of taxes.

> *O'Campo* v. *Hardesty et al*, 383 F.2d 20 (1967).

He fought the deportation for political and ideological reasons a man who lived all but the first eight months of his life in the United States.

Niukkanen v. *Alexander*, 362 U.S. 390, 80 S. Ct. 799, 4 L. Ed. 2d 816 (1960).

He fought the effective displacement of poor people from cheap housing through boondogling Urban Renewal.

City of Portland v. *Swanson et al*, 254 Or. 612, 459 P.2d 879 (Dec. 30, 1969).

He challenged the constitutional validity, not only in this case, but in:

Adamson v. *Thrall*, 262 Or. 408, 498 P.2d 379 (May 22, 1972), 97 Adv. Sh. 1390, 513 P.2d 1157.

when petitioner charged the Supreme Court of Oregon with log rolling and failure to read the record in de novo trials wherein a litigant is entitled to an intelligent trial by all of the justices and not just the one to whom the writing of the opinion is assigned. He alone has demanded complete honesty (that does not now exist) in all of the opinions of the Oregon appellate courts.

Leighton v. *Hawkins et al*, 236 Or. 638, 389 P.2d 460 (March 17, 1964).

wherein the court let stand its statement "one month" when the undisputed fact was three months.

In the foregoing and other cases and in this case petitioner has pointed out that the Supreme Court of

Oregon at times can and does conceal or misrepresent the truth. It does this by making misstatements of fact not supported in any respect by the record. It does it by avoiding properly raised issues with the statement that it has considered the other assignments of error and found them without merit. It does it by saying, "Petition denied" when petitions for rehearing are filed in which it is explicitly shown that the court has misstated a proven fact, thereby avoiding the application of its own statement of the law.

The objectives of those who tried and convicted me is not to protect the public; it is to protect themselves from my attacks on the wrongful exercise of power and my demand for curbing that power by shedding the light of day on their public acts.

Petitioner is being done away with by a few predatory forces within the Bar because petitioner has the courage to attack such forces. See judgment, App. 41.

Fleishman v. *Krause et al*, 261 Or. 505, 495 P.2d 268.

REAL QUESTION

The real question is whether the court and the ruling interests in the Bar have done right by petitioner and by the law. Is the exercise of unbridled power by the appellate judiciary in violation of basic legal principles a force to be curbed? Common Cause has successfully effected safeguards as to legislators. Watergate disclosure has curbed excesses of the ex-

ecutive. Must we wait till a Richard Nixon dons the black cloak of the judiciary before we curb the excesses of the courts? No president of the United States has ever been impeached and convicted but four Federal Court judges were impeached.

ADMONITION OF WAYNE MORSE

The only daily newspaper columnist of Portland, Oregon, Doug Baker, interviewed the great Wayne Morse not long before his death this year. Doug Baker reported the warning Wayne Morse gave to the country in his column of July 23, 1974 in the Oregon Journal:

> "We talked of many things that day but the one that has stuck in my mind was the former senator's assertion that the greatest danger to American liberty lay not with the White House, not with the Pentagon and not with Congress but with the judiciary. 'You mark my word,' he said. 'The day will come when we'll rue the power we have given the courts.' It was an enigmatic remark coming at a time when the nation distrusted the executive branch and wondered about the strength of the legislative arm while placing its trust in the integrity of its judges."

So long as the appellate courts exercise the power to conceal the truth in their opinions and sometimes pronounce falsehoods and so long as the United States Supreme Court permits state appellate courts to exercise such power without answering on the record and for publication all challenges properly brought to them,

the threat of the danger of which Wayne Morse warned us will be the greatest threat to justice and democracy in our country. It is much more important for the United States Supreme Court to require openness and due process and the administration of equal protection by the state appellate courts than that a dissenter like petitioner be forbidden to advance democracy in Oregon's courts.

CONCLUSION

On November 13, 1974 Nelson Rockefeller testified before a Senate committee on his qualifications to be vice president of the United States. He was asked about the financing of a book against former Supreme Court Justice Arthur Goldberg during the 1970 New York governorship election. It was obvious from Mr. Rockefeller's testimony that there was inconsistency with his statement on the same subject made October 11, 1974, about a month previous. He was given ample opportunity to explain the inconsistency. There was no prosecution or threat of prosecution. The hearing was fair to him and to the country. He said, "I know this seems strange but it is true." Also, "I am embarrassed by it and I am humiliated." And, "I did not remember who it was at the time." "I didn't know the facts." "This is the reconstructed story as I now think what happened." "I am reconstructing, I am assuming." In the afternoon of November 14, 1974 Mr. Rockefeller said, "Excuse me for being so inconsistent." Finally, "I told the truth but the truth as I re-

membered it turned out to be totally different from the facts."

Very likely, when the court reads the above paragraph Nelson Rockefeller will be vice president of the United States. I believe he will make a good vice president.

Respectfully submitted,

REUBEN G. LENSKE
Petitioner

November 27, 1974

Appendix 1

No. 10,381—June 27, 1974

IN THE SUPREME COURT OF THE STATE OF OREGON

In Banc

In re Complaint as to the Conduct of REUBEN G. LENSKE, *Accused.*

On petition of Reuben G. Lenske for review of recommendation of the Board of Governors of the Oregon State Bar.

Argued and submitted March 14, 1974.

Reuben G. Lenske, Portland, argued the cause in propria persona and filed briefs.

William B. Crow and *James A. Larpenteur, Jr.,* Portland, argued the cause and filed the brief for the Oregon State Bar.

PER CURIAM.

Accused suspended for two years.

This is a disciplinary proceeding brought by the Oregon State Bar against the accused. The complaint alleges that in an action in the state circuit court the accused testified that he and his wife were the owners of certain real property and that this sworn testimony was contrary to testimony he had given in a previous criminal action against him in the United States District Court, in which he had testified that his brother-in-law was the owner of such property.© The bar

© See Marx v. Lenske, 98 Adv Sh 1274, — Or —, 519 P2d 1036 (1974), and Lenske v. United States, 383 F2d 20 (9th Cir 1967).

alleges that one or the other sworn statement was untrue and was intended to mislead the court.[2]

The issues arising from the complaint and defendant's answer were heard by a trial committee of attorneys which found the accused guilty and recommended that he be suspended from the practice of law for two years. Those findings and recommendations were approved and adopted by the Board of Governors of the Oregon State Bar as recommendations to this court. The accused has petitioned for a reversal of those findings and recommendations.

---

[2] The pertinent allegations of the complaint are as follows:

"III

"During the course of proceedings brought in the Circuit Court of the State of Oregon for the County of Multnomah entitled *William H. Marx, Plaintiff, vs. Reuben G. Lenske, et al, Defendants*, No. 333-466, which case involved, among other things, the ownership of certain real property situated in Multnomah County, Oregon, the accused testified under oath that he and his wife had owned those certain parcels of real property continuously since 1936. This sworn testimony was contrary to testimony given by the accused in the United States District Court for the District of Oregon in the case entitled *United States of America, Plaintiff, vs. Reuben G. Lenske, Defendant*, No. C-19459, where he testified under oath that he was not the owner of the real property in question. He further testified under oath in the Multnomah County proceedings that the testimony he had given in the United States District Court was untrue. Said sworn testimony given in separate proceedings were inconsistent, and one or the other sworn statements given by the accused was untrue and was designed and intentially conceived by the accused to mislead and misrepresent to the court matters and things in controversy.

"IV

"The aforesaid conduct of the accused was and is unethical, unlawful and in violation of the standards of professional conduct established by law and by the Oregon State Bar, and was and is conduct such that if the accused were now applying for admission to the Oregon State Bar his application should be denied."

In support of that petition (and as also alleged in his answer as affirmative defenses) it is contended by the accused: (1) that he was denied equal protection of the laws in that he was not given an opportunity to deny or explain the charges before the complaint was filed, as is the "normal and usual method of procedure," but was "singled out for prosecution"; (2) that he was denied due process in that the complaint "fails to specify the alleged false statements of accused or give or allege the time and place or materiality of the alleged testimony"; (3) that "The Statute of Limitations and/or laches has run against the alleged misconduct"; (4) that it appears from the complaint that the accused was acting as an individual and "was not acting in the capacity of a lawyer" and "there is no allegation that accused was convicted of a crime"; (5) that the Board of Governors was "elected by undemocratic process" in violation of the Fourteenth Amendment to the United States Constitution, with the result that these disciplinary proceedings are invalid; and (6) that "The proceeding herein against accused is quasi-criminal and accused should not have to make an explanation of alternative charges against him and it is wrongful and a violation of due process to require accused to be subjected to the burden of defending himself herein."

In advance of the trial the accused also filed a peremptory challenge to the original chairman of the trial committee. That motion was granted. However, a subsequent attempt to challenge for cause another member of the trial committee was denied. A motion for leave to submit written questions to members of the trial committee, "as on voir dire," was also denied.

A motion was also made to this court to disqualify each member of this court for prejudice and was denied. This court also denied a motion by the accused that the entire file in a previous disciplinary case against him be made a part of the record.

Before discussing the questions raised by these various contentions the facts should be summarized.

Summary of the facts.

1. *The original deeds.*

On January 13, 1936, a "trustee's deed" was executed by C. W. Ingram, as trustee in bankruptcy, conveying to H. J. Mirviss certain real property in Multnomah County. That deed was recorded on January 13, 1936. On February 25, 1937, H. J. Mirviss and his wife executed a warranty deed to Rose M. Lenske, the wife of Mr. Lenske, conveying the same property to her. That deed was not recorded, however, until August 11, 1969. It does not appear from the record in these proceedings whether this was after the death of Mr. Mirviss. It does appear, however, that Mr. Mirviss was dead at the time of the second trial in the state court.

2. *Testimony and position taken by Lenske in 1963 in federal tax trial.*

In 1963 Mr. Lenske was tried in the United States District Court upon charges by the Internal Revenue Service that he had attempted to evade income taxes due for 1955, 1957 and 1958 and had made a false return for 1956. His conviction by the trial court was reversed upon appeal. *Lenske v. United States,* 383 F2d 20 (9th Cir 1967). The case was tried on a "net

worth" theory. This property was one of a large number of properties claimed by the government to be owned by Mr. Lenske.

In that trial Mr. Lenske testified that in 1935 he had made "an investment for my brother-in-law," Mr. Mirviss, who lived in California, and that he had "negotiated a purchase for my brother-in-law" of the land in question; that title to the land was taken "in the name of the purchaser, my brother-in-law," and was never changed from that time until "the present" (1963).

Later in the same trial, on cross-examination by the government attorney, Mr. Lenske testified as follows:

> "Q. Now, sir, I believe you testified that back in the 30's you purchased a piece of timber property in Mr. Merviss' name.
>
> "A. I purchased a piece of property for him.
>
> "Q. Did Mr. Merviss give you the money?
>
> "A. Yes."

The brief filed in the trial court by Mr. Lenske in that case stated as "the defense position" with reference to the "Mirviss timber transaction" that:

> "The property was purchased in 1935 by Mirviss, and Mirviss owned the property then and has owned it ever since. * * *"

3. *Testimony in 1971 in trial of Marx v. Lenske.*

a. *By deposition.*

In the subsequent action against Mr. Lenske in the state circuit court the question arose whether or not this same real property was or was not owned by him. In a deposition taken in advance of trial, Mr.

Lenske first objected to answering questions on this subject, claiming that such questions violated his constitutional rights, including his rights under the Fifth Amendment to the United States Constitution. Upon being required by the trial court to answer such questions, he testified that:

"It was bought for my wife in the first place. • • •"

He also testified that the reason why the title was taken in Mirviss' name was that "It was bought on a competitive bid. I had reason at the time to believe that the bid would more apt to be successful if it was not in my own name."

He also testified that it was "the intention" that "it was his wife's property" when it was originally purchased and that he claimed ownership of the property at all times "until sometime when my brother-in-law was questioned [by the IRS] regarding — on the question of ownership. • • •" Mr. Lenske testified that at that time "I took the same position that my brother-in-law did" and that "he said it was his, and I concurred in that" and that Lenske "acquiesced in his assertion that he owned the property."

He also said that he did not tell his brother-in-law that he in fact owned the property and had always owned it, but acquiesced in that statement by his brother-in-law "in view of the fact that it was unrecorded and still stayed in his name, • • • it might be part of his assets instead of mine or my wife's."

In response to a question whether that "was a true fact," Mr. Lenske testified that:

"It was purchased for my wife and belonged to

my wife all the time. It was handled as ours, hers and my property."

He also testified that the IRS had previously tried to include this property in his "net worth." In response to a question as to why he didn't include it in his "net worth statement" at that time Lenske said that:

"Because my brother-in-law got the idea as long as the property was still recorded in his name and that I had not recorded the deed from him, that he could consistently claim for them that it was his."

b. *On trial.*

On trial of this second case, Mr. Lenske admitted that in the tax trial he had testified that title to the property was vested in his brother-in-law. When asked whether that was "false testimony" he answered:

"Well, let me put it this way: I was incorrect when I said that."

He went on to say that he had been mistaken "because it is interpretation of my previous testimony I think" and that "the theory I adopted at the time was that it was for my tax net worth purposes, tax purposes, it was his, and for any other purposes it was my family's."

In his brief in that case Mr. Lenske made the following statement:

"The evidence on these parcels is so clear and conclusive that I shall not belabor that issue much. The only thread on which to hang their needle on these parcels is my testimony in my tax prosecution case. That testimony must be looked at in the light of the task I was facing. The Internal Revenue Service used all manner of unlawful procedure to

> get me. They tapped my phone, they stole my records, etc. etc. I was using every avenue of escape from unlawful prosecution that seemed available to me. My brother-in-law and I both contended that for the purposes of the tax case against me the property, on record in his name, was his. Between us this was solely for that tax purpose and none other. Condemn me if you will for taking that position but place yourself in my position and then see if you would not take advantage of any opening available to avoid the awsome result of a wrongful prosecution against you. • • •"

After considering the testimony and contentions by Mr. Lenske, among other things, the trial judge held that he did in fact own the property, rather than the estate of Mr. Mirviss. The trial judge also testified in the present proceeding that during that trial Mr. Lenske did not give any false testimony. Because, however, of the evidence that Mr. Lenske had given contradicting testimony during the previous federal tax trial, the trial judge referred the matter to the Oregon State Bar for its consideration. These proceedings were then instituted.

4. *Testimony and position taken by the accused in these proceedings.*

At the hearing before the trial committee Mr. Lenske was asked whether he had testified in the tax case that this property "did in fact belong to Mr. Mirviss and not to you." His response was that "[W]hatever I testified to I testified to, and I'm not going to try by memory to specifically say that I testified to one thing or another." He said, however, that "It was my intention to lead the court to believe that whatever I said was correct and in my opinion,

as for the time and for the purposes involved, whatever I said • • • was correct." When asked whether he thought that "you can own property for all purposes except for tax purposes but not for tax purposes," he replied: "I don't know, I had that impression that it could be done. • • •"

When Mr. Lenske was asked "what your testimony is now?" he answered, "Well, I can't tell you. The only thing that I could do would be to say — I can't say at this time that I said anything different than what the record shows." Mr. Lenske testified, however, that he had been the "initiator in the purchase of the property" in that "he saw the substantial potential"; that he "doesn't know where the money came from, whether it came from money that he produced or whether it came from money that my wife had saved up during the time that she was a kindergarten teacher or whether it came from some other source"; and that:

> "• • • [M]y relationship with my brother-in-law was such that we could and sometimes did by word say it's yours, it's mine, it's yours, it's mine. Not merely for tax purposes, but for other purposes. And if it were his and I wanted it, he would give it to me. If it were mine and he wanted it, I would give it to him. That's the kind of relationship that we had. And, therefore, there was nothing wrong in the testimony that I gave at that time, whatever inconsistencies there may be with later testimony. I could have been right both times."

A member of the trial committee asked Mr. Lenske whether he could "harmonize" his testimony in the two trials. Mr. Lenske's answer was that the tax trial lasted about three months; that he had a lawyer to help him only during the last two weeks and

had been completely on his own during the first two and one-half months of the trial and that although the brief went "under his name" the attorney "figured out some theory, I don't know what it is yet, under which • • • he figured out some theory under which he could even get a reduction of my net worth."

In final argument to the trial committee Mr. Lenske said that the bar put him in "an impossible position with this complaint." He went on to say:

> "But if you will give consideration to the testimony as to the relationship of my brother-in-law and myself, anyone of the answers that might seem inconsistent between 1963 and 1965 or '70, it could have been correct."

and that:

> "• • • [W]hatever he and I agreed between ourselves, even if our motive was to save taxes or to save me from tax trouble whatever he and I agreed, that was it and was valid."

He went on to state that:

> "I had a right to put what would appear to be my best foot forward for myself • • •."

In his brief to the trial committee he stated:

> "Whatever I said when I said it I believed to be true. • • • Moreover there is nothing wrong in the existence of a relationship between a brother and a sister having a relationship of trust with each other so that whatever they agreed with each other from time to time was true. The world is full of mistrust as is evidenced in Washington today, and justifiably so. It should be refreshing to see a close relationship between some people where trust is merited, • • •."

The motions, affirmative defenses and objections by the accused.

1. *The alternative allegations of the complaint.*

The principal contention raised by the motions, affirmative defenses and objections by the accused is that the complaint is improper and insufficient in that it alleges, in the alternative, that the accused gave false testimony in either the federal tax trial or in the subsequent state court trial, but does not inform the accused which testimony is charged as being false.

The accused is correct in his contention that if this were a criminal action for perjury, the established rule at common law is that such an action cannot be based upon such alternative allegations. The accused may also be correct in his contention that a disbarment proceeding against a lawyer is a quasi-criminal proceeding to the extent that it may result in a punishment or penalty imposed on the lawyer, with the further result that the accused is entitled to demand that his constitutional rights be respected in such proceedings. *Re Ruffalo,* 390 US 544, 550-551, 88 S Ct 1222, 20 L ed 2d 117 (1968). See also *In re J. Kelly Farris,* 229 Or 209, 214, 307 P2d 387 (1961). It does not follow, however, that either this complaint or these proceedings were fatally defective.

Because the primary issue in bar disciplinary proceedings is not whether the accused attorney has committed a crime, but his fitness to practice law, the outcome does not turn upon technical definitions of statutory or common law crimes. See *In re Paul F. Gronnert,* 242 Or 233, 236, 391 P2d 772 (1965). How-

ever, as pointed out by Justice White, concurring in *Ruffalo, supra* at 390 US 555:

> "* * * [M]embers of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as malum in se. It also includes conduct which all responsible attorneys would recognize as improper for a member of the profession."

It follows that the allegations of a complaint in a disciplinary proceeding against an attorney need "not conform to the strict technical requirements of an indictment" for perjury and that "the court will look to the substance of the charge rather than the technical accuracy with which it is presented." *State v. Woerndle*, 109 Or 461, 469, 209 P 604, 220 P 744 (1923). In that case the accused made a false statement under oath in an application for a passport. In holding that the accused should be suspended from the practice of law for six months because of that false statement, despite the fact that it was not made by the accused as an attorney or in testimony before a court, this court said (at 476), in characterizing the "substance of that charge":

> "Do trustworthy lawyers make false oaths? That question must be answered in the negative."

Similarly, this court has held that in a disciplinary proceeding against an attorney for giving false testimony proof that such testimony was material to the issues of the case is not required, although required in an indictment for perjury. *In re Moynihan*, 166 Or

200, 111 P2d 96 (1941), in suspending that attorney for three years this court said (at 224):

> "• • • [A]lthough false swearing did not, at the time his testimony was given, constitute a crime in this jurisdiction, it nevertheless has always been considered reprehensible. 'Of all possible acts, few are so antagonistic to the business of judicial administration as the intentional false swearing which seeks to baffle the search for truth, without which justice is impossible. Such swearing is a flagrant insult to the dignity of the court': *In re Ulmer*, 208 F. 461, quoting from Chamberlyne, Modern Law of Evidence, § 249."

ORS 9.480 (1) provides that an attorney may be disbarred, suspended, or reprimanded by this court not only upon conviction for misdemeanors involving moral turpitude and for felonies, but also for conduct "of such nature that, if he were applying for admission to the bar, his application should be denied." ORS 9.220 (2) requires an applicant for admission as an attorney to show that he or she is "a person of good moral character."

As held in *Moynihan, supra* at 225, quoting with approval from *In re John Percy*, 36 NY 651 (1867):

> "• • • It would be an anomaly in the law to make good moral character a prerequisite to an office of a life tenure, while no provision for removal is made in case such character is wholly lost. • • • When there can be no reliance upon the word or oath of a party, he is, manifestly, disqualified, and, when such fact satisfactorily appears, the court[s] not only have the power, but it is their duty to strike the party from the roll of attorneys.'"

Thus, a complaint in a disciplinary proceeding against an attorney is sufficient if it alleges facts

describing conduct of such a nature as to show that the accused is not a person of good moral character.[9].

As for the alternative allegations of this complaint, this court held in *Jones v. Howe-Thompson, Inc.*, 143 Or 337, 342-43, 22 P2d 502 (1933), although a civil case, that:

> "Our rule of pleading (§ 1-604, Oregon Code 1930) requires the pleader in the drafting of his pleading to make a 'plain and concise statement of the facts'. It says nothing about alternative language. Language which is alternative in form may not be sufficiently plain if the pleader plainly knows the truth, or should know it. But it occasionally must occur that after an accident has happened which has inflicted an injury upon one who now desires to sue, that he knows that the prospective defendant committed one or the other of two acts, and was negligent in either event, but is unable to determine with sufficient certainty which one so as to justify him in abandoning the one as a premise

[9] It should also be noted that ORS 9.460 (4) provides that an attorney shall

> "Employ, for the purpose of maintaining the cases confided to him, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of law or fact;"

An attorney who gives testimony as a party and who also acts as his own attorney must exercise extreme care to observe the duty imposed by ORS 9.460 (4) because of the difficulty in distinguishing between his conduct as a party-witness and his conduct as an attorney.

In this case, the complaint alleges that Mr. Lenske gave inconsistent testimony as a witness. It also alleges that such testimony was "designed and intentionally conceived to by the accused to mislead and misrepresent to the court matters and things in controversy." Although not involving the sufficiency of the complaint, it also appears from the evidence that Mr. Lenske not only gave inconsistent testimony as a witness, but that he took inconsistent positions as an attorney in the briefs submitted to the courts in the two cases.

for his action and swearing to the other. *Under such circumstances, if disjunctive language will not unfairly inconvenience the defendant, the plaintiff may employ alternatives in his complaint.* • • •" (Emphasis added)

Similarly, for the purposes of criminal prosecution for false swearing, an indictment in the federal courts may now allege that a defendant has knowingly made two material declarations under oath which are "inconsistent to the degree that one of them is necessarily false" without alleging which declaration was false.[©]

For all of these reasons, we hold that the complaint in this case was not fatally defective in any way which violated the constitutional rights of the accused. It is true that the complaint alleged that the accused gave false testimony in either the federal tax proceed-

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© 18 USCA § 1623 (c) provides:

"(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if —

"(1) each declaration was material to the point in question, and

"(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

"In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true."

ing or in the subsequent state court proceeding, without alleging which testimony was false. This, however, is not a case in which "the pleader plainly knows the truth, or should know it," as stated in *Jones*. We cannot say in this case, either from the allegations of this complaint or from its nature and subject matter, that the Oregon State Bar either knew or should have known which of the two inconsistent statements was true and which was false.

Also, as in *Jones*, we do not believe that the alternative allegations in this complaint caused any "unfair inconvenience" to the accused. The two proceedings were identified, as well as the testimony which was alleged to be inconsistent. Although no legal description of the property was alleged, no contention is made by the accused that he was not fully aware of what property, as well as what testimony, was involved. His position, in essence, is that he was entitled as a matter of due process to know which testimony was alleged to be false. He demonstrated by his testimony, however, that he knew full well which testimony was true and which was what he called "incorrect." Under the circumstances of this case, we do not believe that any of the constitutional rights of the accused were violated by reason of the alternative allegations of this complaint.

We might agree that if, at the time each statement was made, the accused believed it to be true, and in good faith, such a belief would provide a defense to such a charge. Indeed, Mr. Lenske testified to that effect in this case. The issue raised by such a conten-

tion, however, is one of fact and does not go to the sufficiency of the complaint.®

2. *Other affirmative defenses and motions.*

We have also considered the other affirmative defenses and motions by the accused and find them to be without merit.

The fact that the accused was not given an opportunity to explain the inconsistency prior to the filing of the complaint does not invalidate these proceedings. The accused was afforded a full opportunity to do so at the hearing before the trial committee. Neither does the failure to previously provide that opportunity establish that the accused "has been singled out for prosecution" by the Oregon State Bar or by its secretary. The fact that the Oregon State Bar may not have brought charges against some attorneys who have been found guilty of criminal violations, as also complained of by the accused, is also insufficient to establish that defense. In any event, we find no substance to that charge.

The materiality of the inconsistent statements need not be proved in such a proceeding. Cf. *In re Moynihan, supra* at 224. See also ORS 162.075. The statute of limitations and laches are not defenses. *State v. Woerndle, supra* at 476, and *In re Philip Weinstein*, 254 Or 392, 459 P2d 548 (1969), *cert denied*, 398 US 903, 90 S Ct 1689, 26 L ed 2d 61 (1970).

It need not be proved that the misconduct involved actions by the accused in his capacity as an attorney

® As noted below, however, the court has also considered this issue of fact and has found that at the time that Mr. Lenske testified in the federal tax proceeding he knew that testimony given by him in that proceeding was false.

or that he was convicted of a crime. As stated in *In re Otto W. Heider*, 217 Or 134, 159, 341 P2d 1107 (1959):

> "We may say we are not impressed with petitioner's assertion suggestive of a dual personality; the one a man of business and finance, the other, and apparently a secondary concept, a lawyer. How it may be argued that in the capacity of business man he may indulge in practices generally condemned with reference to attorney and client relationships, when the circumstances show such intimate relationship as to make the two practically inseparable, we do not know.
>
> "• • • Under the facts of this case there is no cleavage or separation of responsibility for petitioner's acts as a business man and as a lawyer. He may not employ and accept the benefits of such intermingling of activity involving both law and business without assuming responsibility for both. • • •"

See also *State v. Woerndle, supra* at 469-470.

The fact that the Board of Governors of the Oregon State Bar may have been selected by what is referred to by the accused as an "undemocratic process" does not invalidate these proceedings. ORS 9.540 provided that the Board of Governors may make *recommendations* to this court in disciplinary matters.[3] The findings and recommendations by trial committees appointed by the Board of Governors and by the Board of Governors itself are wholly advisory, although most helpful to the court. The responsibility for the disbarment of an attorney, however, rests solely with this court and it reviews the record in all such proceedings de novo.

[3] ORS 9.540 has since been repealed.

The motion by the accused for leave to submit written questions to the members of the trial committee, as on voir dire, was properly denied. Such a trial committee is not a jury. Appropriate remedies are provided for both peremptory challenge and challenges for cause by Rules of Procedure § 26, promulgated pursuant to ORS 9.580. The peremptory challenge of one member was granted. The attempted challenge for cause of another member was properly denied. Although the accused may have filed a motion for leave to submit written questions within the time required for challenge by Section 26 he did not submit the challenge for cause within that time.

We also hold that the motion by the accused to disqualify each member of this court for prejudice has no basis either in law or in fact. The primary basis for that motion is that this court has on occasion ruled against the accused in various cases in which he has appeared. No mention is made of the cases in which this court has held in favor of the accused or his clients. It is also contended that members of this court are prejudiced because the Oregon State Bar has, on occasion, made and supported recommendations that the salaries of judges be increased. If this were true this court would also be disqualified from hearing any case involving the legislature or any of its members.

The charges of misconduct were established by the evidence.

The accused, in his testimony and briefs in these proceedings, would seek to avoid the charges of misconduct alleged in the complaint by admitting that his

testimony as given during the federal tax trial was "incorrect," but by contending there was nothing improper in the giving of that testimony, considering all of the circumstances. Thus he has contended: (1) that the "idea" at the time of the tax trial that the property belonged to Mr. Mirviss was that of Mr. Mirviss, and the accused only "acquiesced in his assertion that he owned the property"; (2) that his attorney in the tax trial "figured out some theory, I don't know what it is yet"; (3) that "In each instance, whatever I said I thought was true"; (4) that there "is nothing wrong" with a "relationship" under which he and Mr. Mirviss might take the position that the property was "yours" or "mine," and "not merely for tax purposes, but for other purposes."

The fact, if true, that it was Mr. Mirviss who suggested the "idea" at the time of the tax trial that the property belonged to him, rather than to Mr. Lenske, does not excuse the giving of false testimony under oath. Neither does the fact, if true, that Mr. Lenske's attorney "figured out" some theory as a defense in the tax case.

In the course of the tax trial Mr. Lenske testified directly and without equivocation that "I purchased the property for him" (Mr. Mirviss) and that he gave Mr. Lenske "the money." Other testimony by Mr. Lenske during that trial and statements appearing in briefs submitted over his name in both the trial court and on appeal were also to the clear effect that the property was purchased in 1935 by Mr. Lenske for Mr. Mirviss and that Mr. Mirviss had been its owner at all times since then.

In the subsequent trial in state court, however, Mr. Lenske testified, again directly and without equivocation, that "It was purchased for my wife and belonged to my wife all the time. It was handled as ours, hers and mine," and that the testimony given by him at the previous federal tax trial was "incorrect."

After an examination of the entire record, including the testimony and briefs submitted by Mr. Lenske in this and in both previous cases, we find that in so testifying at the time of the federal tax trial Mr. Lenske gave testimony that was false; that he knew full well at that time that such testimony was false, and that he gave such testimony deliberately and with the intention that the federal trial court should rely upon the truth of that testimony. We therefore reject the contention by Mr. Lenske that when he gave that testimony he "thought [that it] was true."

Finally, we must reject the bald assertion by Mr. Lenske that there was "nothing wrong" with a "relationship" under which he and Mr. Mirviss might, to suit their convenience, take the position that the property belonged to Mr. Lenske at one time and to Mr. Mirviss at another time, "not only for tax purposes or for other purposes." Any attorney who sees "nothing wrong" with such a "relationship," despite its inherent potentials for tax fraud and fraud on creditors, among other things, does not have the good moral character which is a necessary prerequisite to the practice of law. Cf. *In re Moynihan, supra* at 255.

It is said by Mr. Lenske that such a "relationship" of trust should be regarded as "refreshing" when "the world is full of mistrust as evidenced in Wash-

ington today," with obvious reference to the so-called "Watergate" affair.

On the contrary, one of the foremost lessons to be learned by lawyers from the "Watergate" affair is that when a lawyer is placed under oath to tell the truth he has the duty to do so regardless of his "relationship" with other persons, whether public officials or private clients, except to the extent that he must remain silent to protect the lawful privileges of his clients. Lawyers who have been able to see "nothing wrong" about equally amoral "relationships" and who have given "inconsistent" testimony under oath have no proper place in the practice of law as an honorable profession.

This is not the first occasion on which Mr. Lenske has been found guilty of professional misconduct. See *State ex rel Oregon State Bar v. Lenske,* 243 Or 477, 405 P2d 510, 407 P2d 250 (1965), cert denied, 384 US 943, 86 S Ct 1460, 16 L ed 2d 541, reh denied, 384 US 1028, 86 S Ct 1920, 16 L ed 2d 1047 (1966). Both the trial committee and the Board of Governors have recommended that the accused be suspended from the practice of law for two years. We approve and adopt that recommendation.

Excerpts of Testimony of John Holloway, Secretary of the Oregon State Bar.

Testimony of John Holloway on June 27, 1970 in case No. 762 against petitioner.

Transcript Vol. III:

BY MR. LENSKE:

Q (page 48 line 19) Mr. Holloway, is there a rule or regulation or practice by the Oregon State Bar Association regarding the investigation of alleged violations by lawyers before they are prosecuted?

A There is a rule that requires the Board of Governors to commence an investigation when any attorney is indicted. There is no written rule -- you mean prosecuted by the Bar?

Q (page 49) Yes.

A There is no rule, no, but there is a procedure.

Q What is the procedure?

A (line 8) ...we send it to the accused attorney and ask him for a written explanation...

Q Are you aware of any deviations from that procedure?

A Yes, in cases involving solicitation of legal business... (page 53 line 9) For example, if an attorney is indicted for commission of a crime, we're required to make an investigation.

Q (page 57 line 10) ... how long have you been Secretary of the Oregon State Bar?

A Since 1954.

Q The (page 61 line 2) first act by the Bar insofar as you know, ... relating to the first cause of action against me is the transmission of this letter of March 25, 1969, Exhibit 9, to counsel in this matter, is that right?

A That was our first act...

Q (line 13) ... what was the next step taken after March 25, 1969?

A (line 18) ... was the filing of an amended complaint (line 20) ...The amended complaint ... were filed on June 26, 1969...

Q Now, then at no time in this matter was a letter sent to me seeking an explanation of the charges relating to cause of action No. 1?
A (page 62 line 1) No.

Q (page 62 line 11) Then the procedure relating to the second cause is exactly the same as it was relating to the first cause; is that right?
A Right.

Q (page 63 line 8) Now, did the Bar through yourself... or any of the counsel of the Bar communicate with me in any manner whatsoever to ascertain whether I had an explanation of the factual matter upon which the second cause of action was based?
A ... I doubt it.

Q You have nothing in your records to show that counsel communicated with me in any manner?
A No.

Q (page 63 line 18) ... Where in the amended complaint is there any restatement of the cause of action set forth in the original complaint in the first cause?
A Yes, it isn't in the amended complaint.

Q What disposition, if any, was made relating to the cause set forth in the original complaint?
A It was dropped or not included in the amended complaint?

Q Was there any communication at any time given to me as to what disposition was made of the original complaint?
A Only by service of the amended complaint (five years after the original filing).

Q (page 67 line 4) So there are four causes of action in this amended complaint against me and there was one cause of action in the original complaint, making a total of five causes of action in which a formal complaint was made against me; is that correct?
A In this proceeding.

Q Now, as to none of those five was there any request for explanation made to me by the Oregon State Bar, was there?
A No.

Excerpts of Testimony of John Holloway in case No. 762 on November 20, 1969

Q (page 250 line 18, Vol. II) And this proceeding was commenced against me [redacted] on June 4, 1964, is that right?
A Yes.

A (page 251 line 4 ...If complaint is made against a lawyer for an oral or written complaint, he is sent a copy of it with the request of his explanation.

Q I see, and that's customarily done?
A Yes.

Q (page 255 line 2) Mr. Holloway, did the Oregon State Bar at any time set for hearing the action against me based upon the complaint in No. 762?
THE WITNESS: (line 12) Not on the original complaint.

Excerpts of testimony of John Holloway in case No. 1063 on May 15, 1974

A (Vol I, page 118)... I have a copy of a complaint in No. 762.

Q (page 119 line 18) ... Now, his sole charge in that complaint was the conviction in the tax case, was it not?
A Yeah ... and that was the sole charge.

A (page 119 line 10) The notice to answer is dated the 4th day of June.

Q That's nineteen hundred and sixty---
A Four.

A (page 120 line 2) Okay. The answer was sworn to on the 15th day of June, 1964.

A (page 120 line 23) Well, trial was had in #762 on an amended complaint that was filed some years later.

Q (page 121 line 4) What's the date of that amended complaint?
A ... that was dated June 26, '69.

Q (line 8) Now, would you state whether or not there's

anything in the amended complaint ... that relates directly to the subject of the original complaint?

A ... No direct relationship.

Q (line 21) Now, was that original complaint ever dismissed then?
A Not that I know of.

A (page 132 line 1) ... here's the way we handle a complaint: If we get a complaint in we usually ask the -- send the lawyer a copy of the complaint and ask him for sufficient information to enable us to give a staisfactory answer to the complaint ...

Q (line 13) But is it the usual practice to send a letter of-- letter to the person involved asking for an explanation?
A It's the usual.

Q What percentage of the instances is that done?
A Well, it's done in, I'd say, ninety percent of the cases.

(Note the following which shows the different treatment between petitioner and Lee Johnson)

Q All right. Now, and is it the usual procedure when a person has been convicted of a crime, when a lawyer has been convicted of a crime, to automatically ask for his suspension? page 132 line 18.
A Yes.

Q Do you have the record relating to Lee Johnson?
A I have a file on a matter we looked into concerning Lee Johnson. But I -- it's a confidential matter because no action was taken. No formal complaint was served.

Q (page 133 line 1) No formal complaint was ever filed?
A No.

Q Was a letter of inquiry sent to him?
A I'd have to look.

Q (line 11) ... did you ascertain there was no formal complaint filed against Lee Johnson?
A That's right.

Q Nor recommendation of suspension after his conviction?
A No.

Q But did you send him a letter of inquiry?
A No ... No, we did not. We were sent a copy of the record of some proceeding and had all the record which was then pending, therefore, we couldn't ask him anything except if he were the defendant.

Q So there was no letter of inquiry of him and no complaint filed?
A That's right.

Q And no suspension after his conviction, no suspension recommendation made? (page 134 line 1)

A No. I can tell you that it was the conclusion and decision of the Board of Governors that Mr. Johnson has not been guilty of any professional misconduct warranting disciplinary proceeding. That was a decision made on January 23rd, 1970.

Q Well, did that emanate from the Board in the first instance or was there any action of any kind, inquiry, study, concern on the part of the secretary of the Board and of the disciplinary department?

A It emanated from the Board on a report to the Board including a letter of complaint from Charles O. Porter with all the material attached and the Board took action on that complaint which it does. In other words, we may have on an agenda sixty complaints and the Board can either dismiss them, refer them to a grievance committee, ask for a further explanation from the attorney, or direct formal disciplinary proceedings.

Q (line 17 page 135) Now, during the period from June 4, 1964 to June 26, 1969, a period of five years, Not. 762 ... was pending; is that right?
A Yes.

Q (line 22) What effect does that have on the name of the individual coming up before a Board?
A (page 136 line 4) I don't think it has any.

Q Well, don't you have a list of names that you put before the Board, of pending cases at all times at every meeting?
A Yes, I would say No. 762, Reuben Lenske, was on each agenda all of the time from the time it started until it was off the agenda.

Q So during those five years each time it would show before the Board?
A Right.

Q Still pending?
A Right.

Q (page 137 line 2) In the current proceedings against me before this trial committee now, would your file show whether or not any inquiry was made of me before this proceeding was commenced?
A (line 14) ... I kind of doubt that there was any inquiry made of you...

Q (page 140 line 17) Now, was there any record of any communication to me prior to ... September 22nd, 1972, when the complaint was filed against me?
A No.

Excerpt from Record that shows that the trial was conducted as a casual civil proceeding and not in conformance with In re Ruffalo, supra.

Vol I, page 17, line 21, May 14, 1973.

THE CHAIRMAN:

Any exhibits that are entered will be made a part of the record as in any civil proceeding. You have that right in a quasi-criminal proceeding but that is not how I read the law. I think it's a civil proceeding. Any exhibits that are entered will (page 18) be marked as such and will be identified as a civil proceeding and identified as part of this proceeding. And we will proceed as if this were a civil

proceeding.

MR. LENSKE: I see. Well, I really except to that conclusion, but I will proceed in whatever manner I am permitted.

THE CHAIRMAN: Very well, Mr. Lenske. With that understanding, we are going to proceed as if this were a civil proceeding with a three man trial committee acting as a court.

Excerpt from record that shows how the trial committee discriminated between petitioner and a witness who gave inconsistent testimony.

Testimony of George Joseph, a character witness called by petitioner, Vol. II, May 15, 1974.

THE CHAIRMAN: (page 167 line 5) So you were there and Mr. Lenske was there, both then?

THE WITNESS: That appears to be correct, yes.

THE CHAIRMAN: This would be inconsistent with your previous testimony. Do you want to correct that now?

THE WITNESS: (page 168 line 7) ... What I am having difficulty getting fixed in my mind, and I testified earlier that I thought there was a proceeding in which Judge Jones had required your presence, arising out of Mr. Huber's testimony, and I believe that I was in error there...

Q (page 169 line 13) Well, what I'd like to verify is from Exhibit 13. Does that reaffirm your recollection that Judge Jones made inquiry of Mr. Huber regarding me outside of

my presence?

A That appears to be true, yes. Yes.

Excerpts from the testimony of a character witness,
Robert Lohmann

Q (page 193 line 12) How long have you been an attorney?
A Since 1955.

Q (line 15) I am also Municipal Court Judge for the City of West Linn for a period of two years now.

Q Have you known me since you have been admitted to practice since 1955?
A Yes, I did.

Q And did you know me before that time?
A Yes, I have.

Q Did I represent your mother and your grandmother in investments and other things?
A That's correct.

A (page 194 line 1) Subsequently my own investments too

Q (line 5) Now, in all matters that I have handled for your mother, your grandmother, and for yourself, has there at any time been any misrepresentation of any kind?
A Absolutely not.

Q Were all dealings in these respects satisfactory to yourself and to your mother and grandmother?
A Yes.

Q (line 12) Then when you were about to become a lawye to take the Bar examination at that particular time were yo engaged in some business?
A Yes... I ... had hotel lease in the City of Portland... (line 21) After seven years of working in the hotel, I got a notice to vacate a hundred rooms of furniture in thirty days At the same time I was going to take the Bar exam. And it was kind of frustrating. Came as a big surprise to me at a very terrible time. (page 195 line 1) I didn't know wha to do so I -- Mr. Lenske pointed out -- he was assisting my mother and my grandmother so I went to him and he sa

not to worry about it, he would take care of it, and he says, "you go take the bar exam.: And he had some gentleman, no charge, -- he never charged me for it. He handled, he assisted my wife in disposing of the hundred rooms of furniture.

Q And then did that enable you to study and take the Bar and pass it?
A I don't know -- I would have to say it assisted me a great deal.

Q Now, since then have you had occasion to consult with me and participate with me and also against me on various items of law and also on matters in actual litigation?
A That's correct.

Q In the case of Marx v. Lenske, did you represent the Korsun family that had an interest in a trust estate?
A That's correct.

Q You were attorney in that case for the Korsun family and Korsun heirs, were you not?
A That's correct.

Q Now, was it agreed between us that you and I, on behalf of myself, you on behalf of your clients, arrive at an agreement as to what amount I owed so far as the Korsun estate or the elder Korsuns are concerned?
A We negotiated and we did come to a compromised amount.

Q And what was that amount, thirty thousand dollars?
A I believe it was thirty thousand. I think I -- if I remember correctly, my calculation was thirty-five, but we did compromise to thirty. My client, Mr. Korsun, after it was all done, informed me, maybe a year ago, that you had in fact paid him the thirty-five. I don't remember the exact amount, but the difference, that you made it up to him, you did pay him. So far as I was concerned, that we received everything that I had originally claimed.

Q Was that despite the fact that my legal liability was limited to the lower amount?
A Yes, we stipulated to a judgment for the lower amount. We took judgment for the lower amount and we --:

that's correct. The other amount 00 it came as an -- I was very pleased to hear that that was done.

Q (page 197 line 2) During any matters in either or both cases, was there any time, any circumstance in which you observed any misrepresentation of any kind on my part to the court?

A Absolutely none.

Q (line 14) In all matters that you are familiar with or that you participated in, have I acted in an ethical, lawyer-like manner?

A In my opinion, absolutely.

Excerpts from the record to show the insufficiency of the complaint in respect to identification of the property involved

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Testimony of Petitioner

A (page 205 line 12) Well, in the first place you are talking about two different pieces of property. In the litigation in the Circuit Court there were two separate parcels of property involved.

Q (By Mr. Crow, page 207, line 9) Do you recall having testified in those proceedings in Federal Court that you had negotiated a sale to your brother of some five hundred acres in 1935 or 1936?

A Well in the first place I want to register an objection to each of these questions and this particular question because I do not believe that the complaint was sufficiently definite and certain upon which to base such a question.

THE CHAIRMAN: We'll ask you (Mr. Crow) what the purpose of this document is, Exhibit 16? (page 272 line4)

MR. CROW: (page 272 line 7) Well, Mr. Lenske has testified that there were only two parcels of real property which were the subject of conveyances between he or his wife and Mr. and Mrs. Mirviss. Some of the testimony in the form of transcripts before the court do not specifically identify the real property with which the court is involved at that time. I think with the addition of this exhibit the testimony becomes easier to understand with respect to what parcels of real property the court is talking about and what not.

MR. SMART: (page 272 line 23) Is the ownership of this property shown on Exhibit 16, the subject matter of the complaint or is this outside of the complaint?

MR. CROW: This is not the subject matter of the complaint. That real property was an issue in Judge Olson's case. There were two pieces of real property which were the subject of conveyances between Mr. Lenske and Mr. Mirviss, and that is the second parcel.

(Note - there is no property described in the complaint).

Character Witness - the dean of Oregon lawyers - William Morrison

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May 15, 1973 Vol II.

Q (page 171 line 8) ... What is your experience as a lawyer in the State of Oregon?
A I was admitted in 1924.

A (line 16) ... I was on time treasurer of the State Bar and I represented the State Bar in the House as a delegate in the American Bar Association for six years.

A (line 21) Well, I was on two committees. One with Justice Clark for three years on recommending procedures on trial practice. And then I was on the last committee that revised Canons of Ethics of the American Bar Association.

A (page 172 line 2) I'm this year President of the American College of Trial Lawyers.

Q You now have offices in the Standard Plaza, do you not? (line 9)
A Yes.

Q How many members are there in your firm?
A Twenty-two members ...

Q ... how long have you known me?
A Oh, I'd say since you started practice.

Q (By Mr. Lenske) (page 175 line 4) Mr. Morrison, in our appearances in court and any time that we appeared did insofar as you were able to observe, at any time make any misrepresentation of any kind to any of the courts in which we appeared together?

A No. No, they were all simple matters and you and I have always gotten along all right.

Q In all of the matters that you and I have had with other insofar as you were able to observe, did I act in a lawyer like, ethical manner, in accordance with all the requirements of the Bar rules?

A Oh, yes, in all our dealings. They have been practically all over the telephone.

14

In The Circuit Court of the State of Oregon
For the County of Marion
OPINION

Robert Y. Thornton v. Lee Johnson

Gentlemen, we have had a chance, my colleagues and I, to discuss among ourselves this case. We have decided that the best interests of the people of the State of Oregon would be served, so far as the Circuit Court of Marion County is concerned, by an early decision. We have arrived at a decision. It is a unanimous decision of the three judges. I have put some of these thoughts of ours, which we have subscribed and adhered to, in writing, and will make this statement in explanation of the Court's decision.

For the purposes of the decision in this case, we have selected what we deem to be the four major issues as presented by the pleadings and the evidence. I will discuss each of these briefly, and the evidence in support or contradiction of the issues.

The first issue is that of the alleged false statements relating to the Attorney General and to the scope of the Attorney General's office and responsibilities. We do not find that the alleged false statements in this case are sufficient basis to void the Contestee's election. We are not unmindful of the many statutory provisions which relate to the Attorney General's office on a statewide basis, such statutes as delegate to him varied responsibilities in the field of criminal law. It is a matter of general knowledge, and one of which this Court will take judicial notice, that crime, and its control and prevention, is a matter of greatest concern to the people of the United States and to the people of the State of Oregon. This, we feel, is a subject which is a legitimate issue in the contest for the office of Attorney General in this state. It will be observed that the Contestant, as well as the Contestee, recognized and used crime prevention as a campaign issue.

The second major item we considered is the press release relating to possible antitrust prosecutions. Again, we have carefully examined the allegations and the evidence in support and contradiction of it, and we do not find it to be sufficient to void Contestee's election. We considered the leeway allowed in expressing an opinion of an opponent's actions dur-

ing a political campaign and the basic concept of fair comment of and concerning a political figure, and the immunities that are granted by the First Amendment to the United States Constitution and by Article I, Section 8, of the Oregon Constitution. In light of the foregoing, the other alleged false statements made in the brochures and related campaign material, which were part of a well-planned and brilliantly executed political campaign, are not, in our opinion, of sufficient basis to void the Contestee's election

We find, however, that one the issues of excessive expenditures and the final issue of false filing of the report of personal expenditures, both are meritorious issues and the evidence supports them. This evidence requires the Court, under the clear mandate of the case of Cook v. Corbett, to void the election of Lee Johnson as Attorney General and to deprive him of the office to which he has been elected by an overwhelming majority of Oregon voters.

With reference to the excessive expenditures, we find that the evidence clearly establishes the Contestee and those persons deemed to be the same as the candidate himself, under the provisions of ORS 260.050, spent an amount substantially in excess of that allowed in the general election.

Finally, with reference to the issue made by the amendment to paragraph XI of the petition, relating to the filing of Contestant's Exhibit 26, the Court finds that Exhibit 26, which purports to be a sworn statement of personal expenditures of Mr. Johnson, which is required by statute to be filed, is a totally flase document, having been signed in blank and purporting to have been notarized in Marion County on November 20, 1968, at a time when Contestee was admittedly outside the continental limits of the United States. Such action and such false filing is a deliberate violation of ORS 260.060 and 260.080.

Now even though these findings may seem to be unimportant when compared to the grave consequences of our decision, this Court, under the standards impressed upon it in the case of Cook v. Corbett, no longer has discretion and power to determine what may be trivial or unimportant in an election contest;

so long as there is a violation of Oregon election law, Cook v. Corbett requires that the office be vacated.

Therefore, under the provisions of ORS 251.080, the election of Lee Johnson as Attorney General is hereby set aside, and Robert Y. Thornton is hereby declared to be elected to the office of the Attorney General of the State of Oregon.

On January 6, 1969, contestee made a

MOTION

as follows:

* * * to reopen the case solely for the purpose of having marked as an exhibit and received in evidence a certified copy of an amended statement of contributions and expenditures executed by the contestee on January 6, 1969.

On January 6, 1969, the court denied the above motion.

On January 6, 1969, the court entered

JUDGMENT

as follows:

The above entitled matter having come on regularly for trial, before the Honorable Val Sloper, Honorable George A. Jones and Honorable Douglas Hay, Judges of the above entitled Court, sitting In Banc in the Courtroom, Salem, Oregon on the 17th, 18th and 21st days of December, 1968, the Contestant appearing in person and by and through his attorneys Leo Levenson and Robert B. Duncan, and the Contestee appearing in person and by and through his attorney Donald W. McEwen; and the parties having called witnesses and presented evidence and the Court having considered the evidence and heard the arguments of Counsel, did on the 21st day of December, 1968 render herein its opinion;

NOW THEREFORE the Court does hereby adopt as its general findings and conclusions of law the said

opinion heretofore referred to and does hereby make the same a part of this judgment order;

NOW THEREFORE, it is hereby ORDERED, ADJUDGED and DECREED, that the election of contestee LEE JOHNSON as Attorney General for the State of Oregon be, and the same hereby is vacated and set aside pursuant to the provisions of ORS 251.080, and it is further

ORDERED, ADJUDGED and DECREED, pursuand to the provisions of ORS 281.080 that contestant, ROBERT Y. THORNTON, be, and he hereby is declared elected to the office of Attorney General for the State of Oregon; and it is further

ORDERED, ADJUDGED and DECREED, that the contestant Robert Y. Thornton have and recover his costs and disbursements herein taxed at $.....

Testimony of Reuben Lenske
re Lee Johnson page 279 line 25, and into 280

Mr. Heath: All right. One other question: Do you claim any relationship between the prejudice that you claim against you and the favoritism you claim in favor of Lee Johnson? Is there anything between you and Lee Johnson...?

MR. LENSKE: No, ... there's nothing between me and Lee johnson...I do not contend that he hasn't a lawyer-like job once he undertook his job as Attorney General. I would just say, because of his financial status, because of his social connections, because of ... his connection with a large and prestigious law firm, ...and because I am a sole practitioner and in some respects I'm popular for some of my other views and activities. The Bar, which is establishment minded simply acts one way with a little guy like me and another way with a big guy like Lee Johnson, and I have been denied the same rights as he has.

Excerpts from transcripts of testimony of W. K. Royal submitted with letter to Oregon State Bar on February 11, 1964, which letter stated:

"In my tax case a considerable percentage of witnesses who appeared were lawyers. One of the jurors told me that one of the things that impressed him was the excellence of the testimony of lawyers.

However, the testimony of two of the lawyers was not true. One of these two was W. K. Royal. Enclosed is a copy of a communication which I sent to the U. S. and Multnomah County District Attorneys.

Mr. Royal also negotiated directly with my client while I was attorney of record."

The foregoing letter was dated February 5, 1964 and it included the following:

"In my tax case in the Federal Court one of the witnesses called to testify against me was W. K. Royal. His testimony appears in the reporter's partial transcript of proceedings covering February 19, 20, 21 and 22, 1963. His testimony commences on page 198. On page 203 of the transcript appears the following language commencing on line 22:

'... and then I got in touch with Mr. Lenske about it and tried to straighten it out, and at that time he told me that the property--the contract had been assigned to him.'

"On July 29, 1963 in case No. 274-295 in the Circuit Court of Multnomah County, Mr. Royal testified regarding the same property and/or contract as follows:

A: You told me that you had loaned Mrs. Pavia $500, and that was all;..."...

Q: And I never made any other claim of any kind to you relating to any interest in the property, is that correct, --

A: No... "

Appendix 40

Excerpt from report of the 1972 Committee on Function and Organization of the Oregon State Bar

District	No. of Governors	No. of Lawyers	Population	Ratio of Governors to Lawyers
1	3	1711	536,000	1 to 626
2	3	610	"	1 to 203
3	3	342	"	1 to 114
4	3	515	"	1 to 172
		3178	2,144,000	

The foregoing is the Committee's estimate as set forth in Exhibit 14.

Excerpt from minutes of Board of Governors dated September 7, 1973 finding petitioner guilty.

" Charges - Perjury."

Appendix 41

In the Circuit Court of the United States

For the County of Multnomah

Helene Fleishman, Plaintiff	)	No.
vs.	)	350-577
Krause, Lindsay & Nahstoll, a co-partnership consisting of Donald G. Krause individually and as executor of the estate of Gunther F. Krause, deceased, Dennis Lindsay, R. W. Nahstoll, Wm. H. Poole, Carl R. Neil and Jerard S. Weigler,	)	Judgment
Defendants	)	

The above entitled matter duly came on for trial on October 16, 1972, plaintiff appearing by her attorney, Reuben Lenske, and plaintiff also appearing in person, and defendants appearing by Jerard S. Weigler in person and by William H. Morrison and Thomas Healy Tongue of their counsel; a jury was duly impanelled and sworn and testimony was adduced and the trial of said cause extended through October 17, 18 and 19, 1972 and argument of counsel was duly presented and the jury was instructed by the court and duly retired for deliberation and thereupon returned its verdict on October 19, 1972 as follows (omitting venue and title)

"We, the jury, duly impanelled to try the above entitled cause, do find for the plaintiff and against the defendant in the sum of $2750.

Preston N. Adkins
Foreman"

Based upon said verdict, it is considered, ordered and adjudged that plaintiff does take, have and recover of and from defendants and each of them and the court does hereby enter said verdict and grant plaintiff judgment against defendants and each of them in the sum of $2750 together with interest thereon at the rate of six per cent per annum from August 31, 1967 until paid together with her costs and disbursements incurred herein taxed at $192.00 and that execution issue thereon.

Dated and entered this 20th day of October, 1972.

Pat Dooley
J U D G E

Book 1866 Page 2137
Entered in Journal
Oct 20, 1972

Judgment Docketed
Book 68 page 372,188
231,257 & 354